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81-2211

No.

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

DEAN J. McDONALD, as Collection Agent
for the Trustees of the
National Electrical Industry Fund
Petitioner

v.

HAMILTON ELECTRIC, INC. OF FLORIDA
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTION PRESENTED

Whether an employer-member of a multiemployer bargaining unit, who has given written authority to the multiemployer association to represent the employer for "all matters contained in or pertaining to the current approved labor agreement", and also binds itself to comply with "all of the terms and conditions of employment contained in the [current approved agreement] and all approved amendments thereto", can avail itself of all the benefits flowing from that agreement and amendments thereto, but repudiate any provision of the agreement or amendments thereto that is a "permissive" rather than a "mandatory" subject of bargaining under the Act.

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Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

The petitioner Dean J. McDonald respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on January 22, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 666 F.2d 509 and appears in the Appendix hereto at pp. 1a-9a. The Court's denial on March 3, 1982, of the petitioner's petition for rehearing appears in the Appendix hereto at p. 18a. The decision of the District Court appears in the Appendix hereto at pp. 10a-17a.

JURISDICTION

The judgement of the Court of Appeals for the Eleventh Circuit was entered on January 22, 1982. Petitioner's timely-filed petition for rehearing was denied on March 3, 1982, and this petition is being filed within 90 days of that date. This Court's jurisdiction is being invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29.

Section 185(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

Section 158(a) It shall be an unfair labor practice for an employer —

* * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9(a).

STATEMENT OF THE CASE

This case involves an order of a panel of the Eleventh Circuit Court of Appeals, holding that an employer who granted a multiemployer bargaining unit representative authority to negotiate collective bargaining agreements with local labor unions on its behalf, is not bound by permissive provi-

sions of a collective bargaining agreement negotiated by that representative, as opposed to mandatory provisions, even where the employer accepted and enjoyed the benefits of all other provisions of the agreements.

Respondent, Hamilton Electric, Inc. (Hamilton), a Florida corporation, is an electrical contractor in the building and construction industry. During all times material to the case, Hamilton has utilized union labor from local unions of the International Brotherhood of Electrical Workers (IBEW). Rather than negotiate individual collective bargaining agreements between itself and the IBEW locals, Hamilton has historically signed Letters of Assent (called Assents A and B) which bound it to collective bargaining agreements entered into between the respective IBEW locals and the Florida West Coast Chapter of the National Electrical Contractors Association (FWCC, NECA). Such Letters of Assent are utilized by IBEW locals throughout the United States and Canada.

The Letters of Assent signed by Hamilton are of two types—A and B. The Letter of Assent A has no specific termination date. The Letter of Assent A authorizes the Association to act as its collective bargaining representative for "all matters contained in or pertaining to the current approved labor agreement" between the FWCC and the IBEW local (App. pp. 2a-3a, note 2). This Letter of Assent A can be terminated by the signing party only by giving written notice of termination to the Association and local union at least one hundred fifty days prior to the anniversary date of the then-current labor agreement. That notice was not given.

The Letter of Assent B provides that the signing party agrees "to comply with all of the terms and conditions of employment contained in the [current approved agreement] and all approved amendments thereto" (App. pp. 2a-3a, note 2). A Letter of Assent B has a stated expiration date, but automatically renews itself unless 60 days notice of intent not to renew is given. Should the then-current collective bargaining agreement expire prior to that date, the assenting party is bound to the new collective bargaining agreement entered into by the Association and the local union so long as the Letter of Assent B remains in effect.

Hamilton signed Letters of Assent A with IBEW Local Unions No. 915 Residential and No. 915 Inside on May 6, 1974. Hamilton signed Letters of Assent B for IBEW Local No. 941 Inside on November 1, 1976, and one for IBEW Local No. 308 Inside.

Subsequent to the execution of these Letters of Assent and while they were still in effect, NECA and the IBEW negotiated several new contractural provisions relating to increased pension funds beneficial to the employees and other provisions beneficial to the employers which were incorporated as amendments to the local agreements. Among these provisions was one creating the National Electrical Industry Fund (NEIF) which required employers who were parties by Assent A or B or otherwise to the NECA-IBEW agreements to contribute 1% of their gross payroll to an industry fund to be put in trust and used for the benefit of the employers and employees.[1]

Upon receipt of notice of these amendments, Hamilton notified the IBEW locals that it would not contribute to the NEIF. However, Hamilton continued to utilize labor from the IBEW locals and abide by all other terms and conditions of the collective bargaining agreements including those created by the 1977 amendments.

Petitioner Dean J. McDonald is a collection agent for the Trustees of the NEIF. This suit was brought by Mr. McDonald under Section 301 of the Labor Management Relations Act of 1947, 29 U.S.C. §185(a), to recover those contributions due the NEIF pursuant to the amended terms of the collective bargaining agreements to which Hamilton assented.

The District Court held that Hamilton was bound by the industry fund provision as a part of the entire agreement as amended. The District Court's decision was premised upon two

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[1] On May 17, 1982, the United States Court of Appeals for the Fourth Circuit in *NCA v. NECA*, Case Nos. 80-1808, 80-1809, affirmed a holding of the District Court that the NEIF provision violates the antitrust laws. The antitrust issue was not litigated in the present case and thus is not now before this Court. A request for rehearing *en banc* is being filed in the Fourth Circuit case. Should that be unsuccessful, a petition for writ of certiorari will be filed with this Court.

alternative grounds. The first of these was that the Letters of Assent signed by Hamilton granted the Association authority to bind Hamilton to the 1977 amendments of the collective bargaining agreements, including the amendment creating the industry fund. In addition to this, the District Court concluded that by continuing to accept the benefits flowing from the collective bargaining agreements subsequent to their amendment, Hamilton ratified the 1977 amendments including the NEIF provision and was thus bound by them.

A three member panel of the U.S. Court of Appeals for the Eleventh Circuit reversed the judgment of the District Court, disagreeing with both stated grounds for the District Court's opinion.

The Court looked at the applicable Letters of Assent (A and B), and concluded that what amounts to an unqualified grant of authority to negotiate a multiemployer agreement did not bind the authorizing employer to "permissive" as opposed to "mandatory" provisions of any agreement reached. The Court made this decision in the face of the uncontroverted fact that Hamilton in its "A" assent designated the Association as Hamilton's collective bargaining agent for "all matters contained in or pertaining to the current approved labor agreement" and in its "B" assent Hamilton was bound to "all of the terms and conditions of "employment contained in the . . . agreement and all amendments thereto".

The Court below concluded that the assented-to collective bargaining agreements were "generally" limited to mandatory subjects of bargaining, citing *NLRB v. Wooster Division of Borg-Warner Corp.*, 356 U.S. 342 (1958), and therefore any "permissive" provision could be repudiated. The Court made no mention of the fact that the assented-to agreements contained several other provisions relating to permissive subjects of bargaining.[2] Having reached this untenable conclusion, the court below them labeled the industry fund a permissive rather

[2] These include provisions relating to permissive subjects of bargaining such as the scope of the bargaining unit, Art. II, Sec. 3 (App. pp. 22a-23a); interest arbitration, Art. I (App. pp. 20a-22a); and the right of the union to impose internal discipline, Art. 2, Sec. 6 (App. pp. 25a). (Appendix pages

(footnote continues)

than mandatory subject of bargaining, and concluded that it was not binding on Hamilton.

The court below did so despite the acknowledged fact that Hamilton embraced and continued to enjoy the benefits of the amended collective bargaining agreements, except for its obligation to pay into the industry fund. Since many collective bargaining agreements provide for industry funds and the Board and courts have found these provisions to be lawful and enforceable, the reasoning behind the Court's conclusion is unclear. In any event, the conclusion is erroneous. It is plain under *Borg-Warner* that once there is agreement on a permissive subject of bargaining, and that agreement is incorporated in a total collective bargaining agreement, the permissive provision is just as lawful and enforceable as the provisions which are the subjects of mandatory bargaining.

REASONS FOR GRANTING THE WRIT

I

The Decision Below Poses A Serious Threat To The Federal Labor Policy Favoring The Stability Of Multiemployer Bargaining Units As Enunciated By This Court And The National Labor Relations Board

Multiemployer bargaining has long been utilized in many industries throughout this country,[3] and has been the accepted method of negotiating in the electrical construction industry for many years.

As this Court has long recognized, multiemployer bargaining offers numerous advantages to both employers and unions.

(*footnote continued*)

19a-50a are a reproduction of one of the assented-to agreements which was introduced at trial as Plaintiff's Exhibit A.)

[3] A recent survey indicated that of 1,536 collective bargaining agreements covering 1,000 or more employees surveyed, 648 were multiemployer agreements. U.S. Bureau of Labor Statistics, Dept. of Labor Bull No. 2065, Characteristics of Major Collective Bargaining Agreements—January 1, 1978, at 12, table 1.8 (1980).

It permits smaller employers to compete on a more equal footing with large unions, fosters the development of industry-wide employee benefits programs, encourages flexibility of bargaining positions, and enhances the efficiency of the bargaining process. *Bonanno Linen Service v. NLRB*, ____ U.S. ____, 102 S.Ct. 720, 723, n. 3 (1982).

In recognition of these benefits and of the frequency of multiemployer bargaining and its role in reducing industrial strife, federal labor policy has long favored the stability of multiemployer bargaining units. This Court has stated that multiemployer bargaining is "a vital factor in the effectuation of the national policy of promoting labor peace through strengthened collective bargaining". *NLRB v. Truck Drivers, Local 449 (Buffalo Linen)*, 353 U.S. 87, 95 (1957); accord: *Bonanno Linen Service v. NLRB, supra.*

This policy of encouraging multiemployer unit stability is furthered by stringent rules limiting withdrawal from such units. *E.g., Bonanno Linen Service v. NLRB, supra; Retail Associates*, 120 NLRB 388 (1958).

The interpretation of the Letter of Assent A contained in the decision below provides a major threat to the stability of multiemployer bargaining which this Court and the Board have expressly sought to foster. Under the holding in the decision below, an employer who has assigned his bargaining rights to a multiemployer bargaining agent may make a series of piecemeal withdrawals from the agreement negotiated by that agent whenever it contains a provision not to his liking which pertains to a permissive subject of bargaining. The destabilizing effect of such a rule is appalling.

The bargaining relationship between NECA and the IBEW and the use of Letters of Assent such as those in the present case is long-standing and nationwide in scope. In an unbroken list of cases dating back over twenty years, the National Labor Relations Board (NLRB) and the federal courts of appeal have uniformly held that the signing of a standard IBEW Letter of Assent A (which either is identical or

similar to that in the present case) serves as a basis for inclusion of the assenting employer in the multiemployer bargaining unit represented by the local NECA chapter. *E.g., Northern Nevada Chapter, NECA*, 131 NLRB 550 (1961); *Central New Mexico Chapter, NECA*, 152 NLRB 1604 (1965); *Wayne Electric, Inc.*, 226 NLRB 409 (1976); *Nelson Electric*, 241 NLRB 545 (1979), *enfd.* 638 F.2d 965 (6th Cir. 1981); *Interstate Construction Company*, 227 NLRB 271 (1977); *Amado Electric, Inc.*, 238 NLRB 37 (1978); *A.S. Brooks Electric, Inc.*, 233 NLRB 889 (1977). In no case has any distinction been made between permissive and mandatory subjects of bargaining.

Inclusion in a multiemployer bargaining unit binds the assenting party to *all* of the lawful provisions of the collective bargaining agreement entered into between the assenting party's appointed bargaining agent, in this case, NECA and the IBEW (including amendments such as the NEIF provision). *Nelson Electric, supra; Brooks Electric, Inc., supra* (each of which involved the 1977 amendments in question here).

The decision below, although purporting to apply federal labor law, has ignored Hamilton's membership in the multiemployer unit represented by the FWCC arising from its execution of a Letter of Assent A. Instead the decision is premised upon a strained reading of the Letter of Assent in conjunction with the recognition clause of the assented-to collective bargaining agreement without reference to the realities of collective bargaining. This reading resulted in the Circuit Court's conclusion that the FWCC was authorized to act as Hamilton's bargaining agent solely as to mandatory subjects of bargaining.[4] This raises an issue of national importance requiring review by this Court.

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[4] The recognition clause of the agreement states that "the employer recognizes the union as the exclusive representative of all its employees . . . for the purpose of collective bargaining in respect to wages, hours of employment and conditions of employment". This is a boilerplate provision which mirrors the language of Section 9(a) of the Labor-Management Relations Act, 29 U.S.C. 159(a). Such provisions in the same or similar form appear in virtually all collective bargaining agreements. To interpret such a boilerplate provision as a limitation on the scope of the collective bargaining agreement is to completely ignore the realities of employer-union relations and the collective bargaining process. The distinction between mandatory and permissive subjects of bargaining is important only in determining whether an

(*footnote continues*)

The deleterious effect of the lower court's conclusion upon the stability of multiemployer bargaining is patent. In the give and take of the collective bargaining process, it is common for a party's bargaining "package" to contain interrelated proposals relating to both mandatory and permissive subjects of bargaining. The NLRB, the agency entrusted by Congress with primary responsibility for the formulation of federal labor policy,[5] has long recognized the interrelationship between permissive and mandatory subjects. *E.g., Nordstrom Inc.*, 229 NLRB 601 (1977).

The adverse effect on collective bargaining which the decision below creates is totally destructive of the bargaining process where a multiemployer unit is involved. Under the reasoning of the decision below, each individual member of the multiemployer unit would be bound by the contractual provisions negotiated by its representative and the union only to the extent that these provisions related to mandatory subjects of bargaining. Each individual member would then be free to pick and choose among those provisions which, in its opinion, related to permissive subjects. The chaotic results of such an approach to labor contracts are not difficult to imagine. A union, thinking it had negotiated a single contract with the multiemployer group, would find itself faced with as many different contracts as there are members of the multiemployer unit. In some of these contracts the union or the employer group may receive the permissive provision which it sought as a quid pro quo for concessions it made on mandatory provisions of bargaining. In others it might not.

The possibility of such "mini-withdrawals" from the individual provisions of the contract negotiated by the multiemployer representative poses a far more serious threat to the stability of multiemployer bargaining units than the individual withdrawals prohibited by this court in *Bonanno Linen, supra.* By permitting such an attack upon the stability of multiem-

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(footnote continued)

employer has a *duty* to bargain over a given topic under Section 8(a)(5) of the Act, 29 U.S.C. 158(a)(5). *NLRB v. Wooster Division of Borg-Warner*, 356 U.S. 342 (1958).

[5] *Bonanno Linen Service Co. v. NLRB, supra*

ployer bargaining units, the decision below conflicts with the principles set forth by this Court in *Buffalo Linen, supra, Bonanno Linen, supra,* and of the NLRB in *Retail Associates, supra.* The ubiquitous nature of multiemployer bargaining, combined with the serious threat to the stability of that mode of collective bargaining inherent in the decision below, underscores the compelling need for the resolution of that conflict.

II

The Decision Below Raises A Conflict Between the Eleventh And Sixth Circuits

In *Nelson Electric Co. v. NLRB,* 638 F.2d 965 (6th Cir. 1981), the Sixth Circuit Court of Appeals reviewed the decision of the NLRB in *Nelson Electric Co.,* 241 NLRB 545 (1979). In that case an employer who, in 1975 signed a Letter of Assent A identical in all material aspects to that signed by Hamilton in the present case, argued that it had only authorized the local NECA Chapter to act as its bargaining representative for matters contained in or pertaining to the then-current collective bargaining agreement which had expired in 1976. Because of this, the employer argued, it could not be held bound to the 1976-78 collective bargaining agreement entered into by the local NECA chapter. The Board rejected this argument holding that the Letter of Assent was not so limited and that by executing the letter the employer had become a member of the multiemployer bargaining unit represented by the local NECA chapter. The Board stated:

> . . . if that were not the intent of the Letter of Assent-A, that is to bind employers to an agreement by their granting authority to a multiemployer association to represent them in collective bargaining, then the entire letter is a meaningless piece of paper. *Nelson Electric, supra,* 241 NLRB at 550.

The Board then ordered the employer to come in to compliance with all of the terms of the 1976-78 agreement and specifically to "pay to the appropriate funds, the health and welfare, pension, apprentice training, and *other contributions*

required to be paid by the collective bargaining agreement. . ." (*Id.* at 546, emphasis supplied). The Board thus found that the signing of a Letter of Assent A constituted a *plenary* grant of bargaining authority to the local NECA chapter, thus binding the signing party to *all* provisions to which the local chapter has agreed. No distinction was made between mandatory and permissive subjects of bargaining.[6]

The Sixth Circuit Court of Appeals enforced this order of the NLRB in its entirety, noting:

> Nelson Electric's contention that the "Letter of Assent A" merely bound it to the terms of the collective bargaining agreement ignores the explicit language in the "Letter of Assent A" expressly designating the NECA as Nelson Electric's collective bargaining representative. [638 F.2d at 967.]

The holding of the Board and Sixth Circuit in *Nelson* is thus in direct conflict with that of the Eleventh Circuit below. Each case involved the interpretation of an identical IBEW Letter of Assent A. In *Nelson* that assent was held to be a plenary grant of authority which bound the signing party to *all* of the terms agreed to by the local NECA chapter without regard to their status as mandatory or permissive subjects of bargaining. In the opinion below, that identical Letter of Assent A was held to bind the signing party solely to those provisions negotiated by the local NECA chapter relating to mandatory subjects of bargaining.[7] Because of the widespread use of multiemployer bargaining and letters of assent, together with the threat to the stability of that method of bargaining inherent in the decision below, this Court should resolve this conflict.

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[6] See also *Sheet Metal Workers Union*, 144 NLRB 773 (1963); *Stein Printing Co.*, 204 NLRB 17 (1973) (dissenting opinion of Members Fanning and Jenkins).

[7] These cases arose in different procedural postures. *Nelson* was brought under § 8(a)(5) of the LMRA, 29 U.S.C. 158(a)(5), while the opinion below was brought under § 301 of the LMRA, 29 U.S.C. 185(a). However, the chief issue in each case was the same—to what extent a party signatory to an IBEW Letter of Assent A was bound by the collective bargaining agreement entered into by their respective bargaining agents.

III

The Interpretation Of The Ratification Issue In The Decision Below Raises A Conflict Between The Eleventh And Tenth Circuits

In *Arco Electric Co. v. NLRB*, 618 F.2d 698 (10th Cir. 1980), the Court was asked to review the decision of the NLRB in *Arco Electric Co.*, 237 NLRB 708 (1978). In *Arco* an employer who had signed an IBEW Letter of Assent B virtually identical to that executed by Hamilton in this case, claimed that he was not bound by the 1976-78 collective bargaining agreement. The Board held, *inter alia*, that the employer was in fact bound by that agreement due to the fact that he had abided by its terms and received the benefits flowing from it up until the point at which the increased contributions required by the 1977 amendments to that contract (including the NEIF) went into effect.[8] Such conduct, the Board reasoned, constituted ratification of the agreement thus estopping the employer from claiming he was not bound by the agreement as amended in 1977.

This finding of the Board's was enforced by the Tenth Circuit. In considering the employer's argument that he could not be held bound by the 1977 amendments because he had not approved them, the Court stated:

> Arco says that the 1977 contract amendments, which increased employers' contributions to Union funds, were invalid because Arco did not approve them. The contract permits amendments with the consent of the parties, who were NECA and the Union. Nothing in the contract requires notice of an amendment to Arco or any other employer. [618 F.2d at 700.]

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[8] The Board also held that the language of the Letter of Assent B was sufficient to bind the Employer to the collective bargaining agreement including the 1977 amendments (no mandatory/permissive distinction was drawn). This finding was rejected by the Tenth Circuit because the Letter of Assent B had expired prior to the execution of the 1976-78 agreement. There is no question in the present case that the Letters of Assent B executed by Hamilton had *not* expired. The reasoning of the opinion below is thus in conflict with the reasoning of the Board in *Arco*.

The decision below held that conduct on the part of Hamilton that was identical in all material aspects to that of the employer in *Arco* did *not* constitute ratification of those same 1977 amendments. The two decisions thus stand in irreconcilable conflict; a conflict which should be resolved by this Court.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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